Federal Circuit has repeatedly permitted equitable tolling of the 120-day deadline in a broad array of factual situations.

3. Petitioner cites several decisions of this Court for the proposition that "limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." Pet. 2 (quoting *Young* v. *United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted)); see Pet. 9-12 (citing *Young*, 535 U.S. at 49; *United States* v. *Beggerly*, 524 U.S. 38 (1998), *United States* v. *Brockamp*, 519 U.S. 347 (1997)). Petitioner also references several court of appeals decisions for the general proposition "that Congress does *not* implicitly preclude equitable tolling by simply providing one or more specific exceptions to a particular statutory deadline." Pet. 2 (citing *Neverson* v. *Farquharson*, 366 F.3d 32, 40-41 (1st Cir. 2004); *Chung* v. *Department of Justice*, 333 F.3d 273, 277 (D.C. Cir. 2003); *Perez* v. *United States*, 167 F.3d 913, 917 (5th Cir. 1999)).

The court of appeals' decision in this case, however, is not inconsistent with *Young*, *Beggerly*, or *Brockamp*, or with the various court of appeals decisions relied on by petitioner. In the first place, those decisions involved statutes of limitations, not jurisdictional timing-of-review provisions like Section 7266, and thus provide no support for a broad rule of equitable tolling in the circumstances of this case. Even leaving that basic distinction aside, moreover, the approach taken by the court of appeals here is consistent with those decisions. The court first concluded that equitable tolling of Section 7266 *is available* as a general matter, and then asked whether "Congress has either provided or intended that equitable tolling be unavailable in the situation at issue."

Pet. App. 7a. (citing *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)); see *Bowen* v. *City of New York*, 476 U.S. 467, 480 (1986) (determining first "whether equitable tolling is consistent with Congress' intent in enacting [the statute]," and then deciding "whether tolling is appropriate on these facts"). That is precisely the approach mandated by this Court's equitable tolling cases and followed by the decisions from other circuits cited by petitioner.

In deciding whether equitable tolling applies to the particular circumstances presented here, the court of appeals did not proceed by negative implication alone. Rather, the court looked to the text, structure, and legislative history of the statute to determine that equitable tolling was not available in the specific context of untimeliness due to the use of a private mail carrier. Pet. App. 3a-4a. Petitioner's argument that deposit with an overnight carrier is sufficient to invoke equitable tolling is contrary to the plain language of the statute and, indeed, would create another exception not contemplated by Congress. Cf. *Beggerly*, 524 U.S. at 48-49 (given "the unusually generous nature of the [Quiet Title Act's] limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted").

The legislative history of Section 7266 demonstrates that Congress specifically considered whether the benefit of the postmark rule should apply to private common carriers like Federal Express, and determined that it should not. Pet. App. 7a-9a. Indeed, regarding the proposed amendment to Section 7266, Congress recognized that "if a [notice of appeal] is delivered to the Court (for example, by private courier or delivery service), it would be considered timely filed if it was received by the Court

within the 120-day limit established by Congress." *Id.* at 8a (quoting 140 Cong. Rec. at 28,849).

Congress' clear intent to apply the postmark rule only to filings made by United States mail would thus be thwarted if equitable tolling could be used to excuse the untimeliness of a notice of appeal made tardy solely because the appellant used a private courier or delivery service rather than the United States mail. The court of appeals was therefore correct to conclude that "Congress's explicit decision not to broaden the postmark rule by extending it to delivery services other than the Postal Service must trump any extension of equitable tolling to this case." Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2006

(3)

No. 05-605

IN THE
Supreme Court of the United States

JOHN MAPU, JR.,

Petitioner,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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The Government begins its opposition brief with a curious "threshold" argument. Opp. 6. According to the Government, "under a correct understanding of the governing legal principles, ... the question set forth in the petition is not presented in this case." *Id.* That is so, the Government asserts, because the statute at issue here, 38 U.S.C. § 7266, is a "timing-of-review provision[]," not a limitations provision, and hence supposedly not subject to equitable tolling. *Id.*; *see also id.* at 8. The Government concedes, as it must, that the Federal Circuit squarely rejected this argument in *Bailey v. West*, 160 F.3d 1360, 1366-67 (Fed. Cir. 1998) (*en banc*), *see* Opp. 6; indeed, the Government contends that it would have been futile even to raise this argument below, *see id.* at 7 n.3.

This "threshold" argument is not an argument *against* review by this Court; it is an argument *for* review by this Court. If the Government is right, then the Federal Circuit's error is more profound, not less so. Because only the Federal Circuit can hear appeals from the Court of Appeals for Veterans Claims, *see* 38 U.S.C. § 7292, only the Federal Circuit can address whether, and under what circumstances, equitable tolling applies to 38 U.S.C. § 7266. As noted above, the *en banc* Federal Circuit in *Bailey* rejected the Government's sweeping position that equitable tolling *never* applies to § 7266 (thereby overruling previous panel decisions, *see, e.g.*, *Cummings v. West*, 136 F.3d 1468, 1472 n.2 (Fed. Cir. 1998); *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994); *Butler v. Derwinski*, 960 F.2d 139, 140-41 (Fed. Cir. 1992)). If, as the Government contends, the *en banc* decision in *Bailey* is wrong, then the Federal Circuit is wasting its time by deciding equitable tolling cases arising under § 7266 (including, but not limited to, this one). *See, e.g.*, *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005); *Brandenburg v. Principi*, 371 F.3d 1362, 1363-64 (Fed. Cir. 2004); *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004); *Bailey v. Principi*, 351 F.3d 1381, 1383-84 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d

1293, 1297-98 (Fed. Cir. 2002); *Jaquay v. Principi*, 304 F.3d 1276, 1283 (Fed. Cir. 2002) (*en banc*). Although a litigant "is entitled to defend the judgment on any ground that it properly raised below," *Jones v. United States*, 527 U.S. 373, 396 (1999), it is hardly persuasive for the Government to argue against review in *this* case by arguing that the Federal Circuit erred in *another* case (especially an *en banc* case like *Bailey*). If anything, the Government's challenge to *Bailey* only underscores that review is appropriate here because *neither* side thinks that the Federal Circuit correctly analyzed this case.

Turning to the question presented in the petition, the Government's position boils down to the proposition that the application of equitable tolling here would be "contrary to the plain language of the statute." Opp. 9. Tellingly, however, the Government identifies no such "plain language." Rather, the Government simply insists that petitioner's appeal was untimely under the statute, because a notice of appeal sent by Federal Express (unlike a notice of appeal sent by U.S. mail) must be *received* (not merely *sent*) by the due date. *Id.* at 9-10. The Government thereby falls into the same trap as the Federal Circuit: the assumption that the invocation of equitable tolling to excuse noncompliance with a particular statutory deadline implicitly conflicts with that deadline.

That assumption, needless to say, misses the whole point of equitable tolling. The doctrine does not come into play at all *unless and until* a litigant has missed a deadline. Therefore, to prove that a particular pleading is untimely is not to prove that equitable tolling does not apply. If a litigant is run over by a car on his way to file a pleading on its due date, there is no question that the document is late, but the question remains whether equitable tolling can excuse that tardiness. To say that the "text, structure, and legislative history" of 38 U.S.C. § 7266 require a notice of appeal filed by Federal Express to *arrive* at the Veterans Court by the due date, Opp. 9, in

other words, is not to say that the "text, structure, and legislative history" of 38 U.S.C. § 7266 preclude equitable tolling under these circumstances.

To the contrary, the default rule is that equitable tolling *is* available "unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation omitted). Here, nothing in the text (not to mention the structure or history) of § 7266 says anything about tolling. Rather, the text, structure, and history of § 7266 simply establish that petitioner's appeal was untimely, a point petitioner does not dispute. What both the Federal Circuit and the Government are missing, in other words, is something to show that Congress intended to preclude equitable tolling *above and beyond* the fact that petitioner missed a statutory deadline, and does not fall within a statutory exception to that deadline. *See* Pet. App. 9a, Opp. 9-10. With respect to the availability of equitable tolling, the Federal Circuit *did* "proceed by negative implication alone." Opp. 9. For this reason, the decision below conflicts not only with this Court's decision in *Young*, but with the decisions of other courts of appeals recognizing that equitable tolling is not *per se* inapplicable where, as here, a litigant falls outside a particular exception to a statutory deadline. *See, e.g.*, *Neverson v. Farquharson*, 366 F.3d 32, 40-41 (1st Cir. 2004); *Chung v. Department of Justice*, 333 F.3d 273, 277 (D.C. Cir. 2003); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999).

The Government thus misses the point by asserting that petitioner's position "would create another exception not contemplated by Congress" to the statutory deadline. Opp. 9. To hold that equitable tolling is available here would not be to hold that petitioner is entitled to relief. Rather, it would simply be to hold that petitioner has an opportunity to *seek* relief based on the equities of his particular situation. That is why equitable tolling is not inconsistent with a statutory deadline: whereas a litigant

who complies with a deadline need not prove anything more, a litigant who invokes equitable tolling bears the burden of proving that he is entitled to relief based on the equities of the case.

Nor is it true, as the Government asserts, that the Federal Circuit "did not foreclose the operation of equitable tolling" here as a matter of law, "but instead held only that petitioner's particular excuse for late filing was not one that merited equitable relief." Opp. 7. The Federal Circuit held that equitable tolling is categorically unavailable to veterans, like petitioner, who file untimely notices of appeal by Federal Express rather than U.S. mail. Pet. App. 7a-9a. Contrary to the Government's assertion, the Federal Circuit did *not* hold that equitable tolling is available here, but that petitioner was simply not entitled to "relief" under that doctrine based on the equities of this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should grant the petition, and either set the case for plenary review or summarily reverse the decision below.

Respectfully submitted,

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